Supreme Court, U.S.
FILED
JAN 18 1996
CLERK

No. 95-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

MICHAEL P. McGOVERN
AYRES & PARKEY
620 Market Street, Ste. 650
Knoxville, Tennessee 37901
(615) 637-1181

THOMAS C. CROOKS
Three First National Plaza, Ste. 535
Chicago, Illinois 60602
(312) 641-2260

HARVEY GROSSMAN
Counsel of Record
JANE M. WHICHER
BARBARA P. O'TOOLE
ROGER BALDWIN FOUNDATION OF ACLU, INC.
203 N. LaSalle Street, Ste. 1405
Chicago, Illinois 60601
(312) 201-9740

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

52 pp

QUESTION PRESENTED

Whether the City violated the First Amendment by terminating business with an independent contractor solely because the contractor exercised his constitutionally protected right of political belief and association by supporting the incumbent mayor's political opponent for election?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

THE CONSTITUTIONAL PROVISIONS AT ISSUE 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. INDEPENDENT CONTRACTORS' POLITICAL ASSOCIATIONS ARE PROTECTED BY THE FIRST AMENDMENT. 9

A. Petitioners' Political Association With Paxson's Opponent and Refusal to Associate Politically With Paxson are Protected 11

B. Petitioners' Political Speech is Protected 15

1. Petitioners were sanctioned under a practice of viewpoint suppression 15

2. Petitioners were sanctioned under a practice of forced speech 17

C. Petitioners' Refusal To Make Campaign Contributions To A Candidate He Opposes Is Protected 19

D. A Blanket Ban On The First Amendment Rights Of Government Contractors Cannot Be Squared With This Court's Precedents 21

II. THE COURT OF APPEALS FAILED TO CONSIDER THE PENALTY ON PETITIONERS' RIGHTS AND THE CITY'S INTEREST IN PATRONAGE 21

III. GOVERNMENT INTEREST IN PATRONAGE DO NOT JUSTIFY THE DENIAL OF FIRST AMENDMENT RIGHTS TO ALL WHO DO BUSINESS WITH GOVERNMENT 32

A. Effective And Efficient Government 33

B. The Need For Politically Loyal Employees 35

C. Preserving The Democratic Process 37

CONCLUSION 41

TABLE OF AUTHORITIES

PAGE

Cases:

Abercrombie v. City of Catoosa, 896 F.2d 1228 (10th Cir. 1990) 10

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 10, 13, 20, 22

Anderson v. Celebrezze, 460 U.S. 780 (1983) 40

Baggett v. Bullitt, 377 U.S. 360 (1964) 16

Baird v. State Bar of Arizona, 401 U.S. 1 (1971) 22

Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995) 24

Branti v. Finkel, 445 U.S. 507 (1980) 7, 36

Brown v.Trench,787 F.2d 167 (3d Cir. 1986) 36

Buckley v. Valeo, 424 U.S. 1 (1976) 6, 11, 18, 20, 23

Chicago Teachers Union, Local No.1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986) 29-30

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal., 454 U.S. 290 (1981) 11

City of Ladue v. Gilleo, __ U.S. __, 114 S.Ct. 2038 (1994) 15

Copsey v. Swearingen, 36 F.3d 1336 (5th Cir. 1994) 24

Cousins v. Wigoda, 419 U.S. 477 (1975) 11

Dolan v. City of Tigard, ___ U.S. __, 114 S. Ct. 2309 (1994) 14

Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.), *cert denied* 502 U.S. 1005 (1991) 5, 25

Elrod v. Burns, 427 U.S. 347 (1976) 6, 8, 9, 12, 13, 14, 16, 20, 26, 27, 28, 30, 33, 35, 36

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 19, 21

Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982) 26

Havekost v. United States Dept. of Navy, 925 F.2d 316 (9th Cir. 1991) 24

Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986) 28

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 11, 12, 40

Keller v. State Bar of California, 496 U.S. 1 (1990) 10, 13, 20

Keyishian v. Board. of Regents of State of N.Y., 385 U.S. 589 (1967) 16

Kusper v. Pontikes, 414 U.S. 51 (1973) 11

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert denied*, 464 U.S. 1044 (1984) 5-6, 25, 26

Lefkowitz v. Turley, 414 U.S. 70 (1973) 31

McDaniel v. Paty, 435 U.S. 618 (1978) 22

McIntyre v. Ohio Elections Com'n, __U.S.__, 115 S.Ct. 1511 (1995) 10, 14, 18

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 17

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943) 29

NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449 (1958) 11

Ness v. Marshall, 660 F.2d 517 (3d Cir. 1981) 36

Norman v. Reed, 502 U.S. 279 (1992) 9, 13, 40

North Mississippi Communication, Inc. v. Jones, 792 F.2d 1330 (5th Cir. 1986) 24

O'Hare Truck Service, Inc. v. City of Northlake, 47 F.3d 883 (7th Cir. 1995) 2, 22

O'Hare Truck Service, Inc. v. City of Northlake, 843 F.Supp. 1231 (N.D. Ill. 1994) 2

Pell v. Procunier, 417 U.S. 817 (1974) 22

Perry Ed. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983) 16

Perry v. Sindermann, 408 U.S. 593 (1972) 6, 9, 14, 23, 33

Pickering v. Bd. of Educ. of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563 (1968) 22

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992) 15

Riley v. National Federation of the Blind of N.C. Inc., 487 U.S. 781 (1988) 17

Rosenberger v. Rector & Visitors of the University of Virginia, __ U.S. __, 115 S. Ct 2510 (1995) 14, 15-16, 17, 20

Roth v. United States, 354 U.S. 476 (1957) 18

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 5, 14, 30, 32, 33, 36, 37, 40

Shelton v. Tucker, 364 U.S. 479 (1960) 11

Simon & Schuster Inc. v. Members of New York State Victims Bd., 502 U.S. 105 (1991) 15, 22

Smith v. Cleburne County Hospital, 870 F.2d 1375 (8th Cir. 1989) 24

Speiser v. Randall, 357 U.S. 513 (1958) 15, 16

Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982) 23

Sweezy v. State of New Hampshire,
354 U.S. 234 (1957) 10

Tinker v. Des Moines Indep. Community Sch. Dist.,
393 U.S. 503 (1969) 22

Triad Associates, Inc. v. Chicago Housing Authority,
892 F.2d 583 (7th Cir. 1989) 25

Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995)
(No. 94-1654, argued November 28, 1995,
*sub nom. Board of Commissioners, Wabaunsee
County, Kansas v. Umbehr*) 23-24

Waters v.Churchill, __ U.S. __, 114 S. Ct. 1878
(1994) 7, 22

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 16, 17

Wooley v. Maynard, 430 U.S. 705 (1977) 17

Constitutional and Statutory Provisions

U.S. Const. amend. I 3

U.S. Const. amend. XIV § 1 3

18 U.S.C. § 287 34

18 U.S.C. § 874 34

18 U.S.C. § 1001 34

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. §§ 1331 and 1343 2

28 U.S.C. § 2514 34

31 U.S.C. § 3730 34

65 ILCS 5/3.1-25-35 38

65 ILCS 5/3.1-25-50 38

65 ILCS 5/4-3-10 38

65 ILCS 5/4-3-16 38

625 ILCS 5/4-200 *et seq.* 34

625 ILCS 5/4-202-203 ..... 5, 34

625 ILCS 5/5-202(a)(b) 34

625 ILCS 5/12-606 34

735 ILCS 5/20-101*et seq.* 35

Act of July 7, 1995, P.A. 89-95 (Illinois) 38

Other Authorities

M. Tolchin and S. Tolchin, *To the Victor* (1971) 10, 39

No. 95-191

In The

Supreme Court of the United States

October Term, 1995

O'HARE TRUCK SERVICE, INC.
and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON,
and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995). It is reprinted in the appendix to the petition for writ of certiorari in this case at page 2a (hereinafter "P.A. __"). The opinion of the United States District Court for the Northern District of Illinois is reported as *O'Hare Truck Service, Inc. v. City of Northlake*, 843 F.Supp. 1231 (N.D. Ill. 1994), and is reprinted at P.A. 10a.[1]

JURISDICTIONAL STATEMENT

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1343. Petitioners appealed the District Court's dismissal of this case to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291. On February 10, 1995, the Court of Appeals affirmed the District Court's decision. Rehearing by the Court of Appeals was denied on March 3, 1995. P.A. 1a.

This Court's jurisdiction was invoked under 28 U.S.C. § 1254(1) in a Petition filed July 31, 1995. On December 8, 1995, this Court granted the Petition.

---

[1] The opinions involved are reprinted in the Appendix to the Petition for a Writ of Certiorari in Case No. 95-191. Citations to this Appendix are made to the page number therein as "P.A. ___a." Citations to the Appendix in Respondents' Brief in Opposition are made as "R.A. ___a." Citations to the Joint Appendix are made to the page number therein as J.A. ___."

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

For nearly three decades, beginning in 1965 and continuing until July of 1993, Petitioners O'Hare Truck Service, Inc. ("O'Hare") and John Gratzianna provided towing services to Respondent City of Northlake, Illinois ("City"). First Amended Complaint at ¶¶ 9, 14, P.A. 22a, 23a. O'Hare provided the City with towing services under various circumstances, including accidents, mechanical breakdowns, and the abandonment of vehicles. ¶¶ 5,7, P.A. 21a, 22a. When the

City needed a vehicle towed, it would request service from a company on a list which was maintained by the City police department. It was the practice of the City to distribute its towing work among these companies -- including O'Hare -- by selecting them in turn. ¶ 7, P.A. 22a. During this entire period, O'Hare performed these services in a professional and competent manner. ¶ 21, P.A. 24a.

In 1993, Respondent Reid Paxson ran for reelection as mayor. ¶ 11, P.A. 22a. Mr. Gratzianna was asked by Paxson's campaign committee to contribute to Paxson's reelection campaign. ¶ 12, P.A. 22-23a. Mr. Gratzianna refused to do so and instead openly supported Paxson's opponent, including placing campaign posters at O'Hare's place of business in Northlake. ¶ 13, P.A. 23a.

Because Mr. Gratzianna refused to contribute to Paxson's campaign and instead supported the mayor's opponent, in July 1993, the City removed O'Hare from its list of towing companies and stopped doing business with Petitioners. ¶¶ 14, 16, 17, P.A. 23a. As a consequence, Petitioners lost a substantial amount of income. ¶ 15, P.A. 23a.

On September 24, 1993, Petitioners filed this action, alleging that Respondents, Mayor Paxson, Police Chief Sapoznik, and the City of Northlake, had violated their First and Fourteenth Amendment rights of political association, speech and due process by ceasing to do business with O'Hare because of Mr. Gratzianna's refusal to contribute financially to Mayor Paxson's campaign and his support for the mayor's opponent during the last election.

Respondents moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). The District Court indicated in a preliminary order that it was inclined to grant dismissal based on the Seventh Circuit's holding in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991), which rejected any First Amendment protection (whether for speech or political association) for independent contractors. Pursuant to the preliminary order, the Petitioners simultaneously submitted a First Amended Complaint and a memorandum of law opposing dismissal, arguing that *Downtown Auto Parks* conflicted with pertinent Supreme Court precedents. The District Court subsequently dismissed the First Amended Complaint with prejudice.

On appeal, Petitioners asked the Seventh Circuit to reconsider its broad denial of First Amendment rights to independent contractors in light of the principles enunciated in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and others of this Court's cases. The Seventh Circuit noted that it already had considered the impact of *Rutan* in *Downtown Auto Parks*, however, and refused to revisit the issue. Although the court had acknowledged in *Downtown Auto Parks* that "the scope of *Rutan*, and rationale behind it, seem to be at odds with the holding of" earlier Seventh Circuit decisions rejecting contractors' political association rights as the basis for a claim, the court nevertheless clung to the reasoning of its seminal case in the area of contract patronage, *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. de-*

nied, 416 U.S. 1044 (1984). The court concluded that "it should be up to the Supreme Court to extend *Elrod* [*v. Burns*, 427 U.S. 347 (1976)]." *O'Hare*, P.A. 5a. Relying on *LaFalce* and subsequent cases, the Seventh Circuit rejected Petitioners' First Amendment claim and affirmed the dismissal. This Court granted certiorari on December 8, 1995.

SUMMARY OF ARGUMENT

This Court consistently has given paramount protection to the core First Amendment rights of political speech and association. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). No reason of law or policy justifies the blanket ban that the Seventh Circuit has imposed on the exercise of these rights by independent contractors. An individual who agrees to perform services for or at the request of government does not forfeit these rights. Nor may the government condition the receipt or retention of government benefits on the waiver of rights of speech and association. *See Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

Any abridgement of these fundamental First Amendment freedoms is subject to the most exacting scrutiny of constitutional review. The burden is on government to establish that compelling interests justify its actions and that it has chosen means least restrictive of rights of association and speech. *Buckley v. Valeo*, 424 U.S. at 25, 45-46.

Government's interest in the conduct of its independent contractors is limited to ensuring that the services are properly and efficiently performed. Government generally lacks

a sufficiently compelling reason to restrict the political affiliation of such persons. Interests generally asserted in support of patronage practices do not justify terminating municipal business with an independent contractor because of a refusal to affiliate with an incumbent mayor during reelection. These interests serve no governmental purpose, except in the limited circumstances where the contractor performs services for which political loyalty to the mayor would be "an appropriate requirement for the effective performance" of the services. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Petitioner towing company does not perform services requiring such political affiliation.

Similarly, the related political speech of a contractor should not be penalized in the absence of compelling justification, such as disruption of the operational efficiency of government. If, as in this case, the contractor performs its duties outside the government workplace, is not supervised by the government employer, cannot be said to speak for the government, and does not perform the duties of a high-level office, there is no justification for restraints on political speech. *See Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878 (1994).

The decision of the Court of Appeals conformed to no established standard of constitutional review or analysis. Under that court's precedents banning all rights of political association and speech for government contractors, Respondents were not required to and did not offer any justification for their actions. Distinguishing public employees whose rights of political association have been protected by this Court

from political discharge, the court below determined that the Petitioners were not as dependent on government as are employees, and were therefore less likely to be vulnerable to forced political affiliation. The court then gave deference to the perpetuation of the institution of patronage, without examining government's interest in retaliating against contractors for their political associations. For these reasons, the Court of Appeals concluded that Petitioners were without legal recourse though they actually had been penalized for their refusal to associate and to make campaign contributions contrary to their beliefs. *Cf. Elrod v. Burns*, 427 U.S. 347, 359 (1976) (dismissal for failure to support party "penalizes" the exercise of associational rights). The court's analytical framework failed to measure any of the interests required by any test under this Court's First Amendment jurisprudence.

In summary, no constitutional basis exists for creating a categorical exception to freedom of political association and speech for independent contractors. This Court should reverse the decision of the Court of Appeals and remand the case to the District Court.

ARGUMENT

I. INDEPENDENT CONTRACTORS' POLITICAL ASSOCIATIONS ARE PROTECTED BY THE FIRST AMENDMENT.

This case involves a municipality's retaliation for a contractor's protected political activities.[2] Below, Petitioners separately review each component of Petitioners' activities which formed the basis for Respondents' retaliatory termination of O'Hare's business relationship. Each component -- candidate affiliation, campaign speech, and financial contribution -- is a part of the nucleus of free speech and associational interests that form the heart of the First Amendment.

These same core First Amendment freedoms were the foundation for this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976). In the twenty years since *Elrod*, this Court has protected vigorously First Amendment rights of political speech and association in a myriad of different contexts, including ballot access rules, *Norman v. Reed*, 502 U.S. 279 (1992) (new party's disqualification from ballot under rules regarding use of party names and signature requirement is

---

[2] Though O'Hare does not have a formal contract with the City, both the District Court and the Seventh Circuit treated O'Hare's claims as those of an independent contractor, as apparently they would any non-employee of government. The lack of a contract is not legally significant to the Court's First Amendment analysis. *Perry v. Sindermann*, 408 U.S. 593 (1972). For ease of reference, Petitioners generally have referred to O'Hare as an independent contractor. Respondents have done the same. *See, e.g.*, Respondents' Brief in Opposition at 5-9; Defendants' 12(b)(6) Motion to Dismiss, J.A. 23, ¶¶ 3, 4.

unconstitutional); referendum leafletting, *McIntyre v. Ohio Elections Comm'n*, __U.S.__, 115 S.Ct. 1511 (1995) (state may not constitutionally require campaign leaflets to bear name and address of publisher); and union and bar association dues, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (teachers' union may not constitutionally include funds for political causes in dues assessment); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (same for members of bar).

Each of Petitioners' political activities is protected under this Court's extensive First Amendment jurisprudence. This constitutional protection is not vitiated by the invocation of the label "political patronage." Even if there is a patronage aspect to this case -- the City's discretionary dispensation of benefits to Mayor Paxson's political supporters and its withdrawal from his opponents -- the City's interest in that patronage practice must be subject to constitutional scrutiny.[3]

The First Amendment principles that formed the basis of this Court's decision in *Elrod* remain as vibrant today as they were the day *Elrod* was decided. They should be applied to this case with the same vigor that this Court always has used in analyzing restraints on core First Amendment activity.

---

[3] Patronage may be broadly defined as "the allocation of the discretionary favors of government in exchange for political support." M. Tolchin and S. Tolchin, *To The Victor* 5 (1971). The courts below tacitly treated the City's policy of political retaliation as being a patronage practice.

A. Petitioners' Political Association With Paxson's Opponent and Refusal to Associate Politically With Paxson are Protected.

This Court long has recognized that the ability of individuals to come together for collective political action is at the core of the First Amendment. "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality).

Political associational behavior frequently is intertwined with the exercise of many other forms of expression, such as freedom of speech, the right to petition for redress, and voting for the candidate of one's choice. Without protection for associational rights, these other civil liberties would be imperiled. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

This Court's frequent decisions protecting associational activities recognize the right of political association as "fundamental." *E.g. Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (political beliefs and voting); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (campaign contributions and expenditures). *See also Cousins v. Wigoda*, 419 U.S. 477, 482-83 (1975) (right of party to control delegate selection). The right to associate with a political party is an "integral part" of the freedom of association. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

The elevated level of constitutional protection provided to the right of political association was a key aspect of the Court's analysis in *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality). That case was initiated by Republican employees of the Cook County Sheriff's Department shortly after the election of a Democratic sheriff who threatened to terminate employees refusing to affiliate with the Democratic Party. This Court described the toll that patronage takes on First Amendment freedoms. Employees must work for party policies in which they do not believe, and against policies they support. In addition, they are forced to make financial contributions that are "tantamount to coerced belief." *Id.* at 355. To retain their jobs, the *Elrod* workers were required to "pledge their political allegiance to the Democratic Party." *Id.* at 355. "The threat of dismissal for failure to provide ... support unquestionably inhibits protected belief and association, and dismissal for failure to support only penalizes its exercise." *Id.* at 359. The pressure to affiliate with the party in power constrained the ability of employees to associate with others of like political persuasion, thus directly abridging their freedom of political association. *Id.* at 355-57. The interests proffered by the Sheriff were not sufficiently compelling to justify this broad restraint. *Id.* at 369-73.

Since *Elrod*, this Court has continued to afford the strongest protection to the right of political association. For example, in *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), a rule required new parties to obtain more signatures in order to be on a local election ballot than would have been required to be on the ballot in a statewide election. Employing strict scrutiny, this Court invalidated the rule on both political association and equal protection grounds. *See also Norman v. Reed*, 502 U.S. 279 (1992).

The right to associate and freedom from compelled association are two sides of the same coin. One clearly presupposes the other, and both are entitled to the same high degree of protection. *See Keller v. State Bar of California*, 496 U.S. 1, 10; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35. It does not matter whether Petitioners were terminated for their refusal to affiliate with Respondent Paxson's candidacy, or because they chose to affiliate with Paxson's opponent. In either event, the termination of the relationship was nothing more than punishment for Mr. Gratzianna's and O'Hare's decision to act on their political convictions by exercising the freedom of political association. *Elrod*, 427 U.S. at 359.

John Gratzianna's political activities, as described in the First Amended Complaint, are the essence of political association, and formed the basis for the City's decision to terminate its business relationship with O'Hare. Mr. Gratzianna "openly supported" Paxson's political opponent, including the display of campaign posters at O'Hare's place of business, and he declined affiliation with Paxson by "refusing to contribute to Paxson's campaign" despite being solicited to do so. P.A. 22a-23a, ¶¶ 12-13. The penalty assessed by Respondents for Petitioners' associational decisions -- termination of business with the City of Northlake -- was a significant

one, for it caused Petitioners substantial loss of income. P.A. 23a, ¶ 15. *Compare McIntyre v. Ohio Elections Comm'n*, __ U.S. __, 115 S.Ct. 1511 (1995) (civil penalty of $100).

The fact that the City had no continuing legal obligation to maintain O'Hare on the rotation list is irrelevant and does not mitigate the penalty imposed by the City for Mr. Gratzianna's political support of Mayor Paxson's opponent. To the contrary, by conditioning O'Hare's ability to remain on the list on its owner's political affiliation with Paxson, the City directly violated this Court's "unconstitutional conditions" doctrine. It is "well-settled" that government may not deny a benefit to an individual for a reason that infringes on that individual's protected constitutional interests. *Dolan v. City of Tigard*, ___ U.S. __, 114 S. Ct. 2309, 2317 (1994), (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). *See Rutan*, 497 U.S. at 72; *Elrod*, 427 U.S. at 359 (*Perry* "broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a government benefit."). *See also Rosenberger v. Rector & Visitors of the University of Virginia*, __ U.S. __, 115 S. Ct. 2510 (conditioning receipt of student activity fees on viewpoint).

In short, Petitioners were presented with a classic Hobson's choice. To maintain a relationship with the City, Petitioners were required to submit to an unconstitutional condition. Because they refused to do so, they suffered a severe economic penalty.

B. Petitioners' Political Speech is Protected.

1. Petitioners were sanctioned under a practice of viewpoint suppression.

Mr. Gratzianna displayed campaign posters at his place of business as a way of openly demonstrating support for his preferred candidate. Such a display on one's own private property is a time-honored form of political speech. Like a residential sign, a campaign poster is an "unusually cheap and convenient form of communication." *City of Ladue v. Gilleo*, __ U.S. __, 114 S.Ct. 2038, 2046 (1994). Posters and yard signs promoting one's candidate are routinely displayed on supporters' private property during election campaigns.

Petitioners were sanctioned because their sign endorsed Paxson's opponent; thus, the penalty was based on viewpoint. The effect of Respondents' actions is "to penalize [Petitioners] for such speech. Its deterrent effect is the same as if the [government] were to fine them for this speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

This Court's most recent free speech cases resoundingly denounce systems of viewpoint suppression. For example, while regulations imposing a burden on the basis of content are "presumptively unconstitutional," *Simon & Schuster, Inc. v. Members of New York State Victims Bd.*, 502 U.S. 105, 108 (1991), "the violation of the First Amendment is all the more blatant" when speech is targeted because of the speaker's views. *Rosenberger v. Rector & Visitors*, __ U.S. __, 115 S. Ct. 2510, 2516 (1995) (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992)). "The government must abstain

from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker is the rationale for the restriction." *Rosenberger*, 115 S. Ct. at 2516 (citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)). This Court's condemnation of systems of viewpoint suppression could not be more forceful.

The City of Northlake's conduct embodies the essence of viewpoint suppression. Government benefits are bestowed on those who express support for the incumbent mayor, while those who express the contrary view have those benefits unilaterally withdrawn. In penalizing O'Hare for its owner's political speech and association, the City of Northlake has done precisely what this Court consistently has held the First Amendment to forbid. Like the university in *Rosenberger* that facilitated student speech except if it was religious, and like the state in *Speiser v. Randall* that conditioned property tax exemptions on a loyalty oath, the City extracts conformance to its orthodoxy by conditioning Petitioners' contract on expressed loyalty to Mayor Paxson.

In *Elrod*, the plurality noted that a system of punishment for refusal to embrace government-approved positions can result in a government-enforced orthodoxy of views. 427 U.S. at 356 (relying upon *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). *See also Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (termination of teaching contract for refusal to sign loyalty oath); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (same); *Speiser v. Randall*, 357 U.S. 513 (denial of property tax exemption for refusal to sign loyalty

oath). *Cf. Rosenberger*, 115 S. Ct. at 2524 (cautioning that government review of student writings for religious content risks requirement that writings must "meet some baseline standard of secular orthodoxy"). Such an enforced orthodoxy is the anticipated result of the City's practice here; all individuals and companies who wish a business relationship with the City must demonstrate political support of the mayor's re-election bid.

2. Petitioners were sanctioned under a practice of forced speech.

One of the vices of the political patronage practice held unconstitutional in *Elrod* was that it forced workers, on penalty of termination, to work for causes that they did not personally embrace. A long line of this Court's cases teaches that government cannot compel individuals to espouse causes in which they do not believe. *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 790-791 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Wooley v. Maynard*, the Court explained the complementary nature of the right to speak and the right to refrain from speaking. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U.S. at 714.

Just last term, in *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, this Court struck a state statute requiring that campaign literature contain the name and address of persons publishing the literature. Rejecting arguments that the law should be analyzed under the less stringent tests used in cases governing the "mechanics of the voting process," *id.* at 1518, this Court analyzed the regulation under traditional First Amendment standards, applying strict scrutiny to this abridgment of "core political speech." *Id.* at 1519. Just as the state could not compel the newspaper in *Tornillo* to print replies by candidates it had criticized, the state could not compel the leaflet's author to identify herself. *See Id.* at 1520.

Like the leaflets aimed at defeat of a proposed tax levy in *McIntyre*, Mr. Gratzianna's posters and public candidate support, as campaign speech by an interested voter, "occup[y] the core of the protection afforded by the First Amendment." *McIntyre*, 115 S. Ct. at 1518. "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 1518-19 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957) and *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976)). Finally, as in *McIntyre*, Mr. Gratzianna's advocacy took place in the course of the electoral process, thereby strengthening the First Amendment protection afforded it. *Id.*

While Mrs. McIntyre was subject to a civil penalty of $100 for her anonymous leaflets, Respondents exacted a far greater penalty from Petitioners for displaying campaign posters:

withdrawal of city business. If anything, the system at work in this case is more offensive to constitutional values than the one at work in *McIntyre*: unlike that forced speech required by statute, this one is viewpoint-based, unwritten, and imposed at the will of the City's executive.

C. Petitioners' Refusal To Make Campaign Contributions To A Candidate They Oppose Is Protected.

Petitioners' choice of whether to support a political candidate with a financial contribution, and which candidate to support, also enjoys the highest level of constitutional protection. Limitations on political contributions and expenditures directly implicate fundamental First Amendment interests. *Buckley v. Valeo*, 424 U.S. at 23. In addition to serving as a general expression of support for a candidate or issue, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22. Political spending is "at the heart of the First Amendment's protection," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Thus, restrictions on such spending or retaliation for political contributions operate as "a prohibition directed at speech itself." *Id.* at 786.

The *Elrod* plurality also singled out forced contributions for special criticism. "The financial and campaign assistance that [an employee] is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and

any assessment of his salary is tantamount to coerced belief." *Elrod*, 426 U.S. at 355 (citing *Buckley v. Valeo*, 424 U.S. at 19). This Court has continued, since *Elrod*, to actively guard against government-imposed systems of forced financial contributions for political causes.

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), involved a challenge to a requirement that public employees pay union dues that included union expenditures for political causes. The Court's analysis was based on the same principles that formed its holding in *Elrod*. Because public employment cannot be conditioned on a waiver of constitutional rights and because compelling financial support for ideology coerces belief, the inclusion of funds for political causes in the dues assessment contravened the First Amendment. "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than being coerced by the State." *Abood*, 431 U.S. at 234-35 (citing *Elrod*, 427 U.S. at 356-57).

That coercive financing of political causes abridges First Amendment freedoms has continuing vitality in this Court's jurisprudence. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), Chief Justice Rehnquist, writing for a unanimous Court, relied on *Abood* to strike a system of forced payments to a bar association to finance political and ideological activities. *Id.* at 9-11. *See also Rosenberger v. Rector & Visitors*, __ U.S. __, 115 S. Ct. 2510, 2527 (1995) (O'Connor, J., concurring) (noting that the student fee at issue in that case

would be susceptible to challenge under *Keller* and *Abood* if students were compelled to support speech with which they disagreed).

The City invoked government power to require a contribution to Paxon's political campaign as an implicit, but essential, condition of remaining on the rotation list. The tacit conditioning of a benefit on the waiver of First Amendment rights is no different from the termination of employment for speech and associational activities condemned in *Perry*. When the Petitioners refused to contribute, the City penalized that refusal with its most potent sanction: termination of City business. Just as surely as the First Amendment was violated by the forced contribution systems in *Elrod*, *Abood* and *Keller*, it is violated here.

D. A Blanket Ban On The First Amendment Rights Of Government Contractors Cannot Be Squared With This Court's Precedents.

The Seventh Circuit's categorical denial of First Amendment protection to contractors as a class, P.A. 5a, cannot be reconciled with the case law discussed above. This Court has consistently rejected the notion that certain classes of speakers are simply outside the First Amendment. As the Court has pointed out, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). "The Government's power to impose content-based financial disincentives on speech

surely does not vary with the identity of the speaker." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, __U.S.__, 112 S.Ct. 501, 509 (1991). Similarly, efforts by government bodies to burden fundamental First Amendment rights because of a person's occupation have been firmly rejected. *See Simon & Schuster, Inc.*, 112 S.Ct. 501 (convicted authors); *McDaniel v. Paty*, 435 U.S. 618 (1978)(clergy); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)(non-union workers); *Pell v. Procunier*, 417 U.S. 817 (1974)(prisoners); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971)(attorneys); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)(students); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)(teachers).

It is one thing to say that government has certain interests in its business relationship which must be considered in any First Amendment analysis. *Cf. Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878 (1994). It is quite another thing to say that no assessment of interests is required because private businesses forfeit all First Amendment rights when they enter into business relationships with the government. *O'Hare*, 47 F.3d at 885, P.A. 5a. None of the decisions of this Court warrant denial of *all* protection of core political speech and association to *all* businesses who perform services for government.

For example, there are no grounds to assume that all contractors pose a threat to the government's interest in preserving the integrity of supervisory relationships or in avoiding work-place disruption. *See Pickering v. Bd. of Educ.*, 391

U.S. 563 (1968). Neither is there any basis to assume that all entities which do government business necessarily perform duties in which party affiliation, or in this case, candidate affiliation with the mayor, is "an appropriate requirement for . . . effective performance", *Branti*, 445 U.S. at 518. In any event, the City would bear the burden of justifying such restraints. *Buckley v. Valeo*, 424 U.S. 1, 24, 45-46 (1976).

In contrast to the categorical denial of rights by the Seventh Circuit, the Court of Appeals for the Tenth Circuit has held that non-employees are entitled to First Amendment protection from retaliation based on political associations. *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), also involved a towing contractor removed from a rotation list in retaliation for supporting a challenger to the incumbent mayor. In *Abercrombie*, 896 F.2d at 1233, the Tenth Circuit correctly applied this Court's general unconstitutional conditions law to the First Amendment retaliation claim, relying on *Perry v. Sinderman*, 408 U.S. 593 (1973).[4]

Though not directly addressing the issue of political association, many federal circuit courts have held that independent contractors and other non-employees are protected by the First Amendment from retaliation based on speech, including criticism of government officials. In conformity with its decision in *Abercrombie*, the Tenth Circuit held in *Umbehr*

---

[4] In contrast to *Abercrombie*, the Third and Eighth Circuits, in addition to the Seventh Circuit, have held that political associational rights of independent contractors are not protected. *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986), *Fox & Co. v. Schoemehl*, 671 F.2d 303(8th Cir. 1982), *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982).

v. McClure, 44 F.3d 876 (10th Cir. 1995) (No. 94-1654, argued November 28, 1995 *sub nom. Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*), that a government contractor's speech, including public criticism of the governmental officials controlling the contract, was entitled to First Amendment protection. *See also Blackburn v. City of Marshall*, 42 F.3d 925, 934 (5th Cir. 1995) (tow truck operator terminated from rotation list for criticism of bidding method); *Copsey v. Swearingen*, 36 F.3d 1336, 1346 (5th Cir. 1994) (concession stand contractor terminated for criticizing administration of vending program); *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330 (5th Cir. 1986) (termination of placement of legal advertising in newspaper in retaliation for critical editorials); *Havekost v. United States Dept. of Navy*, 925 F.2d 316 (9th Cir. 1991) (licensee working in Navy commissary may state claim for retaliatory termination); *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989) (independent contractor physician entitled to protection for speech on matters of public concern).

While employing varying standards of either *Perry* or *Pickering*, these decisions properly conclude that the retaliatory action against non-employees in the form of denial of business benefits because of the exercise of speech is actionable. It would be a bitter anomaly if the Constitution protected contractors from being terminated for publicly criticizing a public official, but allowed government to cut off its business when the contractors refused to contribute to the reelection of the same official.

The Seventh Circuit's categorical denial of protection to non-employees assured that Petitioners' complaint would not receive an appropriate level of constitutional review. That result is unsupportable in the face of the careful consideration of the core First Amendment values at stake here, and the contrary decisions of this Court and the other courts of appeals.

II. THE COURT OF APPEALS FAILED TO CONSIDER THE PENALTY ON PETITIONERS' RIGHTS AND THE CITY'S INTEREST IN PATRONAGE.

In this case, the Seventh Circuit adhered to the reasoning of its earlier decisions in which independent contractors, because they are not employees, are treated as a class undeserving of any protection against government retaliation based on their political associations or speech. *See Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991); *Triad Associates v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir. 1989); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 416 U.S. 1044 (1984).[5] In so doing, the Court relied upon an analytically flawed framework. The Appeals Court overlooked the substantial body of constitutional law outside of the patronage cases, and distorted the meaning of *Elrod*, *Branti*, and *Rutan* by assuming that those cases conferred additional rights on

---

[5] In *Downtown Auto Parks*, the circuit court, without explanation, extended its earlier holding in *LaFalce*, which provided no protection for political association, to free speech as well. 938 F.2d at 709 n. 5.

employees which do not exist among members of the general public, including those who do business with government.

The decision here was predicated on the adoption of three factors noted in *LaFalce*, the Seventh Circuit's seminal case on contract patronage. In *LaFalce*, the plaintiffs alleged that, though they had submitted the bid most favorable to the City, the contract was given to the mayor's political supporters. 712 F.2d at 293.[6] Without defining or applying any expressed standard of constitutional review and using public employees as the norm, the Court focused on the extent to which conditioning contracts on the basis of political affiliation was likely to "interfere with the free expression of political views whether directly or through its effects on campaign contributions." 712 F.2d at 293. The Court concluded that there was comparatively little chance that independent contractors would give in to pressure to force unwanted political association because most government contractors do not rely on a single governmental entity for their livelihoods, in contrast to a government employee who is likely to have only one job. 712 F.2d at 294. In *O'Hare*, the court adopted this conclusion as its first reason for denying Petitioners' claim. P.A. 5a.

The second *LaFalce* factor adopted by the Court of Appeals was that a rule forbidding discrimination on the basis of political affiliation would invite litigation by disappointed

---

[6] *LaFalce* noted that making political supporters "the beneficiaries of lucrative government contracts" was a part of "the general practice of political patronage," and that the propriety of this form of patronage had not been decided by this Court in *Elrod*. *LaFalce*, 712 F.2d at 295 (quoting *Elrod*, 427 U.S. at 353).

bidders. *Id.* This was viewed as a severe administrative consequence. *Id.*

As its final consideration, the court below, as in *LaFalce*, gave great deference to the perpetuation of the institution of patronage though it did not evaluate whatsoever any interest which the government might have in the specific practice of contract patronage.[7] Declining to reexamine the original assumptions of *LaFalce*, in light of this Court's decision in *Rutan*, the court below refused to allow Petitioners to assert a claim of political retaliation. P.A. 5a.

Petitioners submit that the court's reliance upon *LaFalce*'s speculation as to differences between employees and contractors is factually erroneous and legally irrelevant. Moreover, the failure actually to evaluate government interests in patronage contracting prevented the application of any proper standard of constitutional review.

As a preliminary but important matter, the analysis in *LaFalce* was generated in a case where the plaintiff had not been terminated from an ongoing business relationship. This might explain why that court subsequently focused only on whether the denial of business might be coercive. In contrast, here, however, Petitioners actually were terminated because Mr. Gratzianna refused to contribute and supported the opposition. ¶¶ 12-16, P.A. 22-23a. Like the *Elrod* plaintiffs, Petitioners aver that they were terminated solely on the basis of their political affiliation. *Id.*, 427 U.S. at 359 (dismissal

---

[7] Petitioners discuss the governmental interests traditionally associated with patronage in Section III, *infra* at ___.

for failure to support only penalizes the exercise of protected belief and association). Speculating on the likelihood of harm in this case was not necessary.

Moreover, the Seventh Circuit's factual assumptions regarding the lack of coercion of a contractor's belief are unfounded. There is substantial variation in the size of entities doing business with government and the services which they perform. For example, in this case, O'Hare is not a large publicly held corporation but is owned and operated by Mr. Gratzianna. ¶ 2, J.A. 14; ¶ 2, P.A. 21a. This is not exceptional in the towing industry. As *Amicus* Towing & Recovery Association of America, Inc. ("TRAA") states, "[t]he towing and recovery industry is the essence of small business. The typical company is family-owned and operates four vehicles." TRAA Brief at 3. Moreover, 75 percent of the industry is dependent upon government for towing business. For these concerns, government represents 30 to 60 percent of their revenues. *Id.* at 2.[8] Finally, demand is inelastic in the towing industry and thus the government business not easily replaced. *Id.* at 9.

---

[8] In *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986), the Third Circuit adopted the reasoning of *LaFalce* that there was less dependence and hence less likelihood for the coercion of political affiliation and belief among independent contractors as compared to the public employees in *Elrod*. *Id.* at 675. However, that court expressly limited its holding to the specific motor vehicle agents involved in that case, *id.* at 677, and cautioned that its opinion did not apply to a contractor with "substantial economic dependence on the state." *Id.* at 675 n. 9.

In industries like towing, where the government is the primary or significant source of business, the *LaFalce* analysis overlooks the potential cumulative effect of political retaliation. The teachers in *Abood* and the lawyers in *Keller* were compelled to associate with and support only one entity, their union or state bar organization. In contrast, a towing service may be on the rotation list of numerous municipalities and thus subject to requests for sizeable contributions from numerous officials and subject to dismissal for refusal to contribute. O'Hare, for example, provides towing services throughout Cook and DuPage Counties in Illinois. P.A. 21a, ¶ 2. Like the religious leafletters subjected to potential multiple taxation, a towing service could find itself " . . . crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 115 (1943).

As a matter of law, and contrary to the Seventh Circuit's analysis, this Court has clearly decided that the dollar amount which government seeks to compel contrary to political beliefs is not germane to determining whether the unwilling contributor's First Amendment rights were violated. Outside the patronage context, in *Chicago Teachers Union, Local No.1 v. Hudson*, 475 U.S. 292 (1986), the Court entertained a challenge to the procedures used by the union to determine the appropriate charge to be assessed against union dissenters. In reaffirming that dissenters' funds should not be used, even temporarily, to finance ideological activities, the Court stated, "the amount at stake for each individual dis-

senter does not diminish this concern. For whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Id.* at 305. Similarly, the tax exemption in *Speiser v. Randall*, 357 U.S. 513 (1958), ultimately may have been a negligible amount to the taxpayer, but this Court nonetheless struck down the law without regard to its specific financial impact. *See also McIntyre*, 115 S. Ct. at 1516 (fine of $100).

This Court's patronage jurisprudence is to the same effect. In *Elrod*, this Court noted that "[t]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated." 427 U.S. at 361 n. 13. *Rutan*, where the employment decisions included transfers and promotions in addition to hiring recalls, confirms this conclusion. In extending *Elrod*'s protection to all of these employment decisions, this Court did not distinguish between those involving employment *vel non* and those involving a change in conditions or only incremental raises in pay. It rejected the idea that employment actions "short of termination" do not chill protected activities. Employees and contractors alike "feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold." 497 U.S. at 73. Thus, although the effects for the *Rutan* plaintiffs were not as severe as "losing your job," the ability of employees to freely choose political affiliation was protected.

Finally, in determining the Fifth Amendment rights of independent contractors, this Court has ruled that the threat of a loss of a contract to a government contractor is as great an inducement as the threat of a loss of a job to a public employee. *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973). "A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage." *Id.* at 84.

The second *LaFalce* factor of creating litigation also is of no legal consequence. The mere fact that affording constitutional protection for the political affiliation decisions of private individuals might cause litigation is not a reason to *deny* protection to those decisions. Acceptance of the Appellate Court's reasoning would mean that any fundamental freedom could be abridged simply to advance an interest of inhibiting litigation.

Finally, the Court's deference here to the institution of patronage without evaluating the specific interest of the City in carrying out its political retaliation against a contractor is simply inexplicable. As in *LaFalce*, the court assumed that all patronage practices not already declared unconstitutional by this Court were simply to be allowed to continue and not subject to examination by the lower federal courts.

While petitioners submit that the City's conduct was subject to the highest level of constitutional scrutiny, under any standard of review, the court was required to examine the strength and necessity of the City's interest in requiring political affiliation with, and financial support for, the Mayor

by towing companies. It also was required to evaluate the City's interest in limiting the overt political speech of these businesses outside the confines of government offices. Rather than evaluating any of these interests, the Court relied entirely upon surmise about the potential impact of contract patronage in the abstract and deferred to the characterization of the City's political retaliation as being patronage.

III. GOVERNMENT INTERESTS IN PATRONAGE DO NOT JUSTIFY THE DENIAL OF FIRST AMENDMENT RIGHTS TO ALL WHO DO BUSINESS WITH GOVERNMENT.

In this case, the Seventh Circuit gave great deference to the institution of patronage without ever analyzing government's need for a contract patronage system unbounded by the First Amendment. P.A. 5a. Thus, Respondents became the beneficiaries of the Seventh Circuit's *per se* rule that independent contractors may not challenge the denial of their associational rights. As a consequence Respondents were never required to and did not offer any specific justification for terminating O'Hare from city towing business because of Petitioners' political association. Petitioners submit that Respondents should have been required to establish the compelling interests which justify patronage practices and that the courts below similarly should have evaluated the sufficiency of those interests. Below, Petitioners review the "government interests generally asserted in support of patronage," *Rutan*, 497 U.S. at 69, and submit that those interests have even less force when applied to independent contractors.

A. Effective And Efficient Government.

Effective and efficient government is, of course, a significant interest. *Rutan*, 497 U.S. at 69. But *Elrod* and *Rutan* rejected the notion that employees who belong to a presently out-of-power party will subvert an incumbent's administration, thus fostering ineffective or inefficient government. *Elrod*, 427 U.S. at 365-68; *Rutan*, 497 U.S. at 70. Similarly, those cases rejected the argument that patronage serves efficiency because employees are motivated to make sure of the continuing incumbency of the party in power. *Elrod*, 427 U.S. at 365-68; *Rutan*, 497 U.S. at 70. The ability to discharge ineffective or subversive employees, and the availability of merit systems, adequately promote efficiency and effective government without infringing on associational rights. *Elrod*, 427 U.S. at *id*; *Rutan*, 497 U.S. at *id*.

This conclusion is equally true for non-employees who provide services to government. In this case, the City ran a merit-based program for many years. If a towing company was not performing adequately, in contrast to the facts here, P.A. 22a, ¶¶ 9, 10; 24a, ¶ 21, the City was free to terminate the company from the rotation list on that basis. For that matter, it could have terminated O'Hare for any reason other than one that is unconstitutional. *Perry v. Sindermann*, 408 U.S. 593 (1972)

The City also was free, subject to conditions already imposed by State law on towing companies, to provide, through contract, specific duties and obligations on towing companies that it utilized for services. If the towing company failed

to comply with the terms of the contract, it would be subject to termination and the consequences of its breach as it would be in its dealings with private contractual partners. There is no bar to government enforcing its contracts.[9]

Indeed, the government frequently has many more weapons in its arsenal for ensuring the performance of a contractor than it has for an employee. For example, the federal government may enforce the False Claims Act, 18 U.S.C. § 287, the False Statements Act, 18 U.S.C. § 1001, the Forfeiture Statute, 28 U.S.C. § 2514, the Anti-Kickback Act, 18 U.S.C. § 874, and the Civil False Claims Act, 31 U.S.C. § 3730. Illinois has established similar penalties for defective performance of government contracts, providing for refunds and civil penalties of up to three times the amount received by means of a false record, statement or representations; and it has enacted a provision allowing private citizens to insti-

[9] The conduct of the towing industry in Illinois, as in many states, is regulated by state law. In Illinois, a tow or wrecker operator must register with the Secretary of State, provide the Secretary with vehicle identification numbers, and proof of insurance. 625 ILCS 5/5-202(a)(b).

The Illinois Vehicle Code specifically governs identification, equipment, method of clearing debris from roads, and amounts of insurance. 625 ILCS 5/12-606. In addition, Article II of the Vehicle Code provides detailed instruction for the towing of abandoned, lost, stolen, or unclaimed vehicles. 625 ILCS 5/4-200 *et seq.* Section 4-203 enumerates the circumstances in which law enforcement agencies may authorize a towing service to remove a vehicle. Article II also imposes obligations on law enforcement authorities who authorize towing services to remove a vehicle. Both the towing service and the law enforcement agency are required to maintain certain records and reports. *See*, for example, Sections 5/4-202, 203, and 204. Given the extensive regulation of this business by the State of Illinois, there appears to be little need to further define the basic provision of towing services by contract.

tute suits for such practices. *See* Illinois Civil Procedure Act § 20 (735 ILCS 5/20-101 *et seq.*) (Recovery of Fraudulently Obtained Public Funds).

Thus, even assuming the existence of a contractor who would deliberately subvert the policies of an incumbent -- whether to sabotage the incumbent or to advance the contractor's own contrary political views -- any deficient performance in executing a contract could be heavily sanctioned. The contract and the regulatory regime, not political affiliation, provide the means of insuring government's interests in efficiency and effectiveness. As with government employees, there are means less restrictive of First Amendment rights by which the government can provide any needed supervision.

B. The Need For Politically Loyal Employees

The second interest identified in *Elrod* and *Rutan* -- the need for politically loyal employees -- also is unavailing when generally applied to government contractors. In *Elrod*, this Court held that, by limiting patronage requirements to policymaking positions, a governmental entity could adequately protect its need for employee loyalty. *Elrod*, 427 U.S. at 367; *see also id.* at 376-77 (Stewart, J. concurring) (limiting patronage to "policymaking and confidential" employees). This Court subsequently refined this exception in *Branti*. The test is "not whether the label 'policy maker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affili-

ation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518; *see Rutan*, 497 U.S. at 74.

The same should be true for services provided by independent contractors and other non-employees. For example, the City of Northlake might contract with a public relations firm to write press releases or with an attorney for advice on legal matters. Such positions may well demand political loyalty. *See Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986) (Assistant Director of Public Information, writing press releases and speeches and presenting county's views to press and public, could be terminated consistent with *Branti*); *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981) (same for city solicitor who served as chief law officer of city, represented city in legal actions and rendered legal opinions to city and its officials).

A functional analysis, however, shows that Petitioners are not in a position requiring political loyalty to the elected mayor. They do not determine the circumstances under which a tow truck will be called, nor do they even determine whether a tow truck should be called in any given instance. A tow truck on the rotation list either is available to respond to the police request to tow a stranded automobile or it is not. It either accepts the job or it rejects it. Petitioners' conduct is regulated to a significant extent by state law. *See supra* at n.9. They could not possibly be said to be in a position requiring political allegiance to the mayor. In any event, such a factual determination would more properly be made at trial after re-

mand. Thus, the interest in political loyalty cannot justify a blanket abrogation of the First Amendment rights of *all* independent contractors.

C. Preserving The Democratic Process

The final interest advanced in *Elrod* was that of preserving the democratic process, an argument premised on the idea that partisan politics is central to that process. 427 U.S. at 368. This Court questioned whether eliminating patronage would in fact hamper the democratic process since political parties existed prior to extensive patronage practices and continue despite the decline of patronage. The Court noted that the process functions as well as or better *without* patronage practices, for these "clearly retard" the democratic process by entrenching incumbent parties and by impeding free speech and association. *Id.* at 369-70. Patronage thus is not the least restrictive alternative of achieving whatever such practices do contribute. *Id.* at 368-69; *see also Rutan*, 497 U.S. at 74-75.

The practice of contract patronage raises no different considerations. By being forced to affiliate politically as a condition of doing business, contractors, like government employees, are given a choice: affiliate with a party or candidate whose position one may wish to reject, or abandon the possibility of doing business with government. As with employees, such a practice skews the democratic process by providing incentive to affiliate with a particular party -- the party perceived as the most likely to win and thus distribute pa-

tronage spoils -- regardless of one's actual beliefs.

Moreover, patronage contracting does not advance party discipline and party strength, whatever one may believe about the effects of patronage employment. *See Rutan*, 498 U.S. at 103-04 (Scalia, J., dissenting). At the local level, where contractors may be the most vulnerable to contract patronage, the practice is more likely to compel "candidate" affiliation rather than "party" affiliation. Under Illinois law, the mayor of Northlake is chosen in a nonpartisan election[10] and the Petitioners were asked to contribute to Respondent Paxson's campaign, not to a particular political party. *See Buckley v. Valeo*, 424 U.S. at 22 (giving money affiliates one with a candidate). Thus the interests of "party" are secondary, if present at all.

In addition, contrary to the patronage armies of working people who purportedly become active in politics through the practice of patronage employment, contract patronage generally seeks dollars, not personal participation. Contract patronage does not generate a need for more workers, but to the contrary provides resources for purchases of professional services and media advertising, thus obviating the need for le-

[10] By state statute, municipal elections are nonpartisan, and party designations may not appear on the ballot. 65 ILCS 5/3.1-25-35; 65 ILCS 5/3.1-25-50 (primary and general elections, villages and towns); 65 ILCS 5/4-3-10, 65 ILCS 5/4-3-16 (primary and general elections, commission form of government). Under current Illinois law, aldermen of the City of Chicago are also elected in nonpartisan elections. 65 ILCS 20/21-32. The General Assembly of Illinois has recently amended the State's Election Code to provide that future elections for Mayor of the City of Chicago will be nonpartisan. Public Act 89-95, July 7, 1995.

gions of "volunteer" workers. *Cf. Branti*, 445 U.S. at 528 and n.9 (candidate who cannot attract substantial contribution must rely upon party workers to bring his message to voters, but media enables well-financed candidates to go directly into voters' homes more effectively than even the most well-organized political machine). Mr. Gratzianna was asked to give money, not to ring doorbells.

Furthermore, because the "contribution" is requested from commercial entities, if Judge Posner is correct in *LaFalce*, money, not ideology, is the controlling force which mandates the "cautious neutrality" of American business. *LaFalce*, 712 F.2d at 294. This motivation is more likely to break down party structures than it is to maintain and strengthen them. Thus in a classic work on patronage, *To The Victor*, the authors recount the ire of Republican party leaders over the fact that former party officials were donating money to Lyndon Johnson's President's Club and receiving contracts in return. Contrary to building party loyalty or strengthening the two-party system, contract patronage undermines these interests. The authors write:

> Maintaining that architectural and engineering contracts were awarded arbitrarily without legislative or public oversight, the Republicans resented the opportunities for patronage which cut so deeply into the structure of the Republican Party. What motivations existed for maintaining party loyalty, they asked, in the face of such overwhelming patronage bait dangled so flagrantly from the executive branch of government?

Id. at 276.

Finally, contract patronage advances only *incumbent* party strength, just as the incumbency of Respondent Mayor was served by requiring political affiliation as a condition of doing business with the City. *See Rutan* 497 U.S. at 87 n.4 (Stevens, J., concurring) (patronage use to protect entrenched majority). While Justice Scalia connects party strength to an interest in the two-party system, *Rutan,* 497 U.S. at 106 (Scalia, J. dissenting), even if patronage did advance more than incumbency, it is questionable whether government has a compelling interest in perpetuating a *two-party* system. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court struck an early-filing deadline for candidates that was purportedly justified, in part, by "political stability." This Court observed that the interest "amounts to a desire to protect existing political parties from competition." *Id.* at 801.

As in *Anderson*, this Court should reject the theory that "a political party could invoke the powers of the State to assure monolithic control over its own members and supporters." *Id.* at 803. That is precisely what has happened here. Moreover, contract patronage further entrenches incumbents at the expense of new candidates by siphoning off funds that might otherwise be donated to newcomers. *Cf. Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Bd. v. Socialist Workers Party*, 440 U.S. 173 (1979). Any interest that may be asserted in requiring the political affiliation and support of Mayor Paxson by independent contractors such as Petitioners is nothing more than an interest in maintaining Mayor

Paxson's control over the City.

In sum, the interests traditionally asserted to justify patronage are woefully inadequate to legitimize the City's practice of political retaliation. It neither serves government's operational efficiency nor contributes meaningfully to the democratic process.

CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed. The case should be remanded to the United States District Court for the Northern District of Illinois.

Respectfully submitted

MICHAEL P. MCGOVERN
Ayres & Parkey
620 Market Street
Suite 650
Knoxville, Tennessee 37901
(615) 637-1181

THOMAS C. CROOKS
Three First National Plaza
Suite 535
Chicago, Illinois 60602
(312) 641-2260

HARVEY GROSSMAN*
JANE M. WHICHER
BARBARA P. O'TOOLE
Roger Baldwin Foundation
of ACLU, Inc.
203 North LaSalle Street
Suite 1405
Chicago, Illinois 60601
(312) 201-9740

STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
132 W. 43rd Street
New York, New York
10036
(212) 944-9800

Counsel for Petitioners
*Counsel of Record